

## PROSECUTION v. NKUBIRI ET AL

[Rwanda SUPREME COURT – RPA 0234/08/CS (Havugiyaremye, P.J., Munyangeri and Kanyange, J.) October 17, 2014].

*Criminal Law – Concealment of the stolen items – When the penalty for the felony related to the concealment of the stolen object, the person who concealed the stolen items shall be liable to the penalties reserved to the felony and other offences relating to the/she knew during the concealment [...] – Decree-Law n° 21/77 of 18/08/1977 instituting the penal code, article 431, 4<sup>o</sup>.*

*Criminal procedure – The burden of proof – The burden of proof shall be on the Public Prosecution [...] – Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure, article 85.*

*Criminal Law – Interpretation of criminal law – Criminal laws shall not be interpreted to extensively; they must be construed strictly.–Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, article 4.*

**Facts:** Tubarimo, Nkubiri Mbyogo, Nsengiyumva and Uwimana were aligned before the High Court, Tubarimo charged of murder and armed robbery, Nkubiri Mbyogo of armed robbery, Nsengiyumva Jean de Dieu and Uwimana of complicity in murder. The court found Tubarimo guilty of offences he was charged of, and sentenced him to life imprisonment with special provisions. Yet, the court found Nkubiri Mbyogo, Nsengiyumva and Uwimana not guilty and ordered for immediate release of the three.

The prosecution appealed the judgment to the Supreme Court stating that the incriminating evidences were disregarded.

The hearing was held in absence of the accused who did not appear in court though legally summoned.

**Held:** 1. Nkubiri Mbyogo must be punished for the armed robbery committed to get the bicycles, but pursuant to the new penal code that provides for the lenient penalty. Therefore, he is sentenced to eight (8) years of imprisonment.

2. The prosecution could not prove beyond reasonable doubt that Nsengiyumva is guilty.

3. Evidence presented by the prosecution alleging that they have been disregarded do not incriminate Uwimana beyond reasonable doubt, thus he remains not guilty.

**Appeal of the prosecution has merit in part.  
Nkubiri Mbyogo is found guilty of the concealment of the stolen object.**

**He is sentenced to 8 years of imprisonment.**

**Orders his immediate arrest.**

**No change with regards to Nsengiyumva and Uwimana.**

**½ of the court fees charged to Nkubiri Mbyogo and ½ to the public treasury.**

**Statutes and statutory instruments referred to:**

Organic Law n° 01/2012/OL of 02/05/2012 instituting the penal code, article 4.

Law n° 30/2013 of 24/05/2013 relating to the code of criminal procedure, article 85.

Decree-Law n° 21/77 of 18/08/1977 instituting the penal code, article 431(4<sup>0</sup>)

**No case referred to.**

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] Tubarimo Aloys, Nkubiri Mbyogo, Nsengiyumva Jean de Dieu and Uwimana François were charged of the aforementioned offences before the High Court. The court found Tubarimo guilty of offences he was charged of, and sentenced him to life imprisonment with special provisions. The court found Nkubiri Mbyogo not guilty of armed robbery; Nsengiyumva and Uwimana were found not guilty of complicity in murder. The court therefore ordered immediate release of the three.

[2] With regards to Nkubiri Mbyogo, the court explained that in pre judicial and judicial proceedings he never pleaded guilty and Tubarimo did not accuse him and Turimo had never disclosed to him that bicycles he brought to him to sell were stolen from bicyclists he killed. The court also explained that being friends and the fact that Tubarimo used to give him the bicycles to sell and the fact that he knew that Tubarimo had no means to buy the bicycles is not enough to convict him of the offence because it is based on assumptions especially that even testimonies in charge are full of doubt.

[3] The Court found also that the crime of robbery of bicycles he was charged of, was committed after murdering the cyclists who owned them, yet the prosecution declares themselves having no evidence to prosecute him on the crime of assassination, consequently, the court had no ground to prove that he had information that Tubarimo took the bicycles from the owners after killing them, what is seen as doubt which is benefited by the accused.

[4] With regards to Nsengiyumva, the court explained that Tubarimo does not incriminate him, that what was based on to incriminate him, was a doubtful information accusing him of misleading people who were digging in searching the body of the deceased, because he does not admit it and stated that the judicial police officer wrote what himself wanted after beating him severely. The court wonders why he could have known that Tubarimo killed people and put them in pits while he could not know the reason behind their death, thus stealing their bicycles especially that in the pits are where the pillows and number plates of the bicycles were thrown in order to keep the information closed.

[5] The court explained that Uwimana is also not accused by Tubarimo for having known that the pits he dug were reserved for bodies he killed, he did not even state whether the pits dug by Uwimana at his home were reserved for that. Testimonies from witnesses state that the pits were for banana plantation as some of them were already planted and others were waiting for the rain. About the shoes found at Tubarimo's home belonging to Uwimana, the Court explained that they were left when he was caught and taken from Tubarimo's place to the police station and that even the seized jacket found at the place does not belong to him as some witnesses affirmed it.

[6] The prosecution appealed the judgment to the Supreme Court on the ground that the incriminating evidences were disregarded.

[7] The public hearing took place on 15 September 2014, in the absence of Nkubiri Mbyogo, Nsengiyumva and Uwimana who were legally summoned, and the prosecution was represented by Munyaneza Nkwaya Eric.

## **II. ANALYSIS OF THE LEGAL ISSUE**

**Whether incriminating evidences for Nkubiri Mbyogo, Nsengiyumva and Uwimana were disregarded by the Court.**

### **●Nkubiri Mbyogo**

[8] The prosecutor claims that enough evidence was presented to the first instance court proving that the accused is the one who sold the stolen bicycles by Tubarimo as both of them admit it, but the court disregarded that stating that there was doubt on the crime his prosecuted on. The prosecutor also states that even though Nkubiri said that he was not informed of their origin, he had requested the court not to give it value because he interrupted a lot with Tubarimo and knew that he had no money to buy those bicycles, and the fact that bicycles had no identification documents this caused him to sell them at night as he himself testified and the fact that he was allowed by Tubarimo to fix the prices not even being given the minimum price to base on as also an indication that he was aware the bicycles were stolen. Another evidence the prosecutor stated was from witnesses who affirmed that he knew some of the bicycle owners.

[9] The prosecutor keeps on stating that the court stated that Nkubiri could not be held responsible for theft while he was not prosecuted for murder and yet the prosecution accused him basing on article 257 of the penal code, showing that his role was of selling bicycles for Tubarimo well knowing that they were stolen, and this did not require him to be convicted of murder because for every offence, the role of each person is observed. The prosecutor added that the fact that he never disclosed to the police knowing that bicycles Tubarimo give him to sell were but helped him to accomplish his mission by selling and getting profit from them, the prosecutor finds him guilty of armed robbery.

## **THE VIEW OF THE COURT**

[10] Nkubiri Mbyogo does not deny that the bicycles he was given to sell by Tubarimo were stolen from their owners after killing them. Though it was decided by the first court that Nkubiri was not informed about the origin of the bicycles and the fact that he was ignorant about the death of the owners does not prevent him from knowing that they were stolen based on his statement made before the judicial police where he admitted and explained, "I also believed by all means that they are stolen" I knew he was a thief. He also admitted knowing that he sold stolen bicycles and Tubarimo had told him about it and told him about the boys from Kinazi who brings him bicycles.

[11] Even though in the High Court Nkubiri stated that he was not aware of the origin of the bicycles he was given by Tubarimo, and the latter stated that he told him that he bought the bicycles at Gitarama, the court finds the two statements contradicting with what is in his statement that he admitted to several times. Despite that in his pleadings before the High Court Nkubiri stated that he was told by Tubarimo that the bicycles were bought at Gitarama, the court finds it false as in that case, Tubarimo would have fixed the minimum price, contrary to what is stated in the judicial police that Nkubiri was free to fix the price based on the condition of the bicycle: "We had agreed that in case the bicycle is sold on 20,000Frw,

his share would be 2,000Frw, but as they were different, he told me to sell some at 18.000Frw, and 16,000Frw” This also justifies that Nkubiri was aware of the origin of the bicycles.

[12] Following the fact that Nkubiri sold the bicycles well knowing that they were stolen, the court finds that he must be prosecuted pursuant to article 431 of the Rwandan penal code that was into force when the offence was committed, regarding the concealment of the stolen items instead of article 257 of the penal code as the prosecution stated, it is relating to the concealment of the offender or any fugitive and his/ her accomplice contrary to what Nkubiri committed.

[13] With regards to the concealment of the stolen items, the Law scholar Kint Robert states that to be guilty of this offence, it is not enough to receive the items knowing that they are stolen but to receive them with the fraudulent intent to either benefit from them or help the authors and accomplices to do so. (pour être coupable de recel, il ne suffit pas d’avoir reçu sciemment des choses obtenues à l’aide d’une infraction, il faut qu’on les ait acceptées dans l’intention frauduleuse soit d’en profiter soi-même, soit d’aider les auteurs et complices de l’infraction à en recueillir des avantages).

[14] Despite that Nkubiri sold bicycles and gave the money to Tubarimo, he also had interest from it as he admitted that Tubarimo shared that money with him.

[15] Regarding the penalties, articles 431, paragraph 3 of the penal code provides that when the penalty on a felony is related to the concealment of the stolen object, the person who concealed the stolen object shall be liable to the penalties reserved to the felony and other offences relating to it that he/she knew during the concealment. However, the death penalty would be replaced by life imprisonment”. Paragraph 4 of the mentioned article provides that “Any person who knowingly gets profits from a concealed object obtained from a crime or misdemeanour”.

[16] Based on the provisions mentioned above, the court finds that Nkubiri Mbyogo must be punished with a penalty given to for armed robbery committed when getting the bicycles, but pursuant to the new penal code that provides for the lenient penalty (article 305). Therefore, he is sentenced to eight (8) years of imprisonment.

#### ● **Nsengiyumva Jean de Dieu**

[17] The prosecution states before the court that Nsengiyumva is prosecuted for being accomplice in murder with Tubarimo pursuant to article 257 of the penal code, where he tried to cover up Tubarimo in the course of digging out the bodies of victim she killed, and trying to stop people who were trying to dig out three bodies by misleading and telling them that it was Tubarimo’s mother buried there. He adds that the judge considered false statements from Nsengiyumva where he reversed his statements saying that what he admitted before the judicial police was due to the corporal violence, yet the prosecution had contended that he did not prove it, and that this is inconsistent with article 44, paragraph 3 of the Law relating to the code of criminal procedure.

[18] The prosecutor also contends that the court disregarded the statements made by Nsengiyumva in the court affirming that Tubarimo is his relative and that he saw the pits he dug when he had gone to visit him. He even admits having misguided the local authority and people who were looking for bodies buried in the pits, he stopped them from digging out the bodies and lied to them that there was Tubarimo’s mother. He keeps on stating that he

contradicts himself where he claims to know where Tubarimo's mother was buried and later denies it saying that he was not around when she was buried, implying that he intended to mislead the authorities so that they could not find the three bodies buried there.

[19] The prosecutor states also that the court disregarded the evidence presented to it based on testimonies given by Mukaserire Espérance and Nkurunziza François, who proved that Nsengiyumva mislead people who were looking for the victim's bodies.

## **THE VIEW OF THE COURT**

[20] The court is not convinced enough to take the fact that Nsengiyumva being a relative of Tubarimo and having visited him, without the prosecution linking him to the offence, to proof that he was his accomplice in killing the bicyclists in order to take their bicycles especially that Tubarimo in his guilty plea had never mentioned Sengiyumva's role when he explained the way he brought the bicyclists from their parking place and offered them something to eat or drink after which he hit each with a small hoe.

[21] Furthermore, the fact that Nsengiyumva saw the pits dug, is not enough to incriminate him as all people interrogated including the heads of the local authority acknowledged to have seen the pits and Tubarimo told them that it is where he gets mud used to build his house and others are reserved for banana plantation, a statement similar to what Nsengiyumva stated in his interrogation. The prosecution presents no new evidence that proves Nsengiyumva more knowledgeable about the issue than others who lived in vicinity including the local authority and even his sister testified about having seen him digging but could not know when the bodies were buried.

[22] On the issue of Nsengiyumva stopping and misleading people who were digging out the three bodies saying that it was where Tubarimo's mother was buried, the court finds that he admitted to it during his interrogation in the judicial police and explained that he did it based on the relationship both had because Turimo's mother was his paternal aunt Nsengiyumva gives a considerable statement showing that he thought she is buried there as there are grown flowers, and also explained that he could not hide that place while there were other bodies discovered and he was among people who were digging.

[23] Basing on the above, the court finds that the prosecution failed to prove beyond reasonable doubt that Nsengiyumva is guilty as it remains to be their obligation stated in article 85 of the Law relating to the criminal procedure "The burden of proof shall be on the Public Prosecution [...], and the evidence given is full of doubt.

### **● Uwimana François**

[24] The prosecutor stated that the court acquitted Uwimana while there are many evidences incriminating him made of testimonies and the seized items found on the crime scene including his shoes and jacket. He also stated that he also dug pits similar to those found at Tubarimo's place where he through bodies of people he killed. He adds also that he had refused his parents to visit him and his father testified that he was a close friend of Tubarimo and the pit found in their field was dug by Uwimana without his knowledge of when it was done.

[25] The prosecutor presented another witness known as Musafiri Ildephonse who stated that while digging out bodies at Tubarimo's, he was among people who went to arrest

Uwimana suspecting him to be his accomplice in killings, because it was said that he passes most of his time with him and basing on the testimony of Sindikubwabo François who was the first to know that Uwimana had the same pits dug in his land, he was even the one who took the shoes and the jacket of Uwimana found at Tubarimo's home to the local authority.

### **THE VIEW OF THE COURT**

[26] The prosecutor states that among evidence that was disregarded include the shoes and jacket found at Tubarimo's home belonging to Uwimana, while Uwimana stated that he removed them when he was arrested and this corresponds to what was stated by Musafiri Ildephonse, the one who was left with the shoes where he said that he put them down when he was going to help others to dig out bodies and he never thought about them again. With regards to the jacket, Uwimana denies ownership, and his statements corresponds to one made by Nzabanita and Mbarushimana who affirmed that the jacket never belonged to Uwimana.

[27] With regards to the pits Uwimana is said to have dug, during his interview with the authorities, he stated that it was intended for banana plantations which was evident to one which was dug out in search for bodies and nothing was found out as the case of Tubarimo. The prosecution could not link the findings with the killing Tubarimo committed and to state that they are like those dug by Tubarimo is not enough to confirm that they were dug to serve the purpose of throwing bodies in, when neither the remains nor any other thing related to the bicycles that belonged to the deceased were found in the pit as it was discovered in the pits dug by Tubarimo. Furthermore, as provided for in article 4 of the penal code, the use of an analogy is forbidden in criminal cases where it is stated that Criminal laws shall not be interpreted to extensively, they must be construed strictly. Courts are not allowed to pronounce sentences by analogy.

[28] Basing on the finding mentioned above, the court finds the evidence presented by the prosecution alleging that they have been disregarded not founded to incriminate Uwimana beyond reasonable doubt, thus he remains not guilty.

### **III. THE DECISION OF THE COURT**

[29] Decides appeal of prosecution with merit in part.

[30] Decides that Nkubiri Mbyogo is guilty of the concealment of stolen items.

[31] Sentences him to eight years imprisonment.

[32] Orders for his immediate arrest.

[33] Orders no change with regards to Nsengiyumva Jean de Dieu and Uwimana François.

[34] Orders Nkubiri Mbyogo to pay ½ of the court fees and another ½ be paid by the State.